UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRONTIER COMMUNICATIONS CORPORATION and COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13	Case No. 09-CA-247015

CHARGING PARTY'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

TABLE OF CONTENTS

I. INTRODUCTION

The basic facts of this case are not in dispute: Frontier admits that it refused to provide the information identified in paragraph 6 of the Complaint and failed to notify or bargain with the Union over the effects of its implementation of the I-9 Advantage system, including a discretionary Form I-9 reverification process affecting nearly the entire bargaining unit. Frontier challenges the Union's right to bargain over this reverification process and its corollary right to request relevant information, and will likely argue that compliance with federal immigration law is not a bargainable subject. This is a distraction—an attempt to shift focus away from the Union's well-settled right to bargain over the effects of Frontier's implementation of the I-9 Advantage system. The information sought was either presumptively relevant or clearly connected to the Union's attempt to exercise its right to bargain over the effects of the I-9 Advantage implementation.

Frontier also cannot show that the effects of its I-9 Advantage implementation were de minimis. Frontier shifted the substantial compliance burden associated with locating and presenting verification documents onto the affected employees and made compliance with the reverification process a condition of continued employment. These substantial consequences show that the issue was not de minimis. Nor has Frontier properly raised or adequately supported other defenses it may now assert, such as undue burden, impossibility, or ambiguity. Finally, the Union is entitled to receive the information it requested as part of an appropriate remedy because Frontier has not met its burden to show that the information is no longer needed, and because the information is relevant to the Union's persistent concerns about the security of unit employees' sensitive information.

II. STATEMENT OF FACTS

The Charging Party, Communications Workers of America, District 2-13, (the Union) has for decades exercised representational responsibility for a bargaining unit of approximately 1,300 CWA-represented employees in West Virginia and Virginia currently employed by Frontier Communications. (Tr. 36–37, 96; JX 1–2)[1] These 1,300 employees work from over 100 different offices and field locations spread throughout that area. Letha Perry is the Union's Administrative Director for the District, in which capacity she oversees the Union's contract with Respondent Frontier Communications and supervises the Staff Representatives who service the bargaining unit. (Tr. 31) Prior to joining the Union's staff, Ms. Perry spent over 30 years as a bargaining-unit employee for Frontier and its predecessors. (Tr. 31)

A. Frontier announced widespread reverification of bargaining unit employees' work status using I-9 Advantage.

On July 19, 2019, Frontier sent an e-mail to its bargaining-unit employees notifying them that it had adopted a new I-9 management system, I-9 Advantage, and that "[c]ertain Frontier employees hired/rehired after Nov. 6, 1986 but before March 31, 2018" would be required to complete a new I-9 form, and would be contacted by separate e-mail. (JX 3) District 2-13 Administrative Director Letha Perry received notice of the new I-9 verification process from an employee, not from Frontier. (Tr. 41–42) Frontier's public characterization of the reverification requirement as limited to *certain employees* conflicted with Frontier's internal communications, which indicated that verification was being required for all employees hired during that period. (Tr. 179) And it later became clear that *certain employees* really meant substantially all

[1] References to the transcript of the hearing are denoted by "Tr." followed by page and line numbers, as appropriate. References to the Joint Exhibits are denoted by "JX," references to the General Counsel's Exhibits by "GCX," and references to Frontier's Exhibits by "RX."

employees hired during that period. (Tr. 47, JX 8) The subsequent contact e-mails referenced in the July 19 announcement were sent out around July 22, 2019. (JX 4)

This was not the first time that the issue of Form I-9 verification had surfaced in this bargaining relationship. In 2013, the Employer conducted a broad I-9 reverification after it consolidated its HR files from field offices. (JX 5) The Union demanded bargaining over the reverification process and filed an unfair labor practice charge, which was withdrawn in relevant part after the Employer came to the table. (Tr. 39–40) The Employer agreed to discuss such subjects as the time allowed employees to provide the required documentation, specific documentation issues, and similar concerns. (Tr. 230:7–8; RX 1) Frontier Senior Vice President for Labor Relations Bob Costagliola, who testified at the hearing and was involved in the 2013 bargaining, considered this discussion to be a reasonable approach. (Tr. 231:18–25) Once bargaining began, with the Employer and the Union "working together," (Tr. 188:12) it took only a day to resolve this issue. (Tr. 88:4–8)

Ms. Perry was concerned about the 2019 announcement because the Union had already dealt with this issue in 2013. She contacted her counterpart at Frontier, Peter Homes, reminded him of their 2013 agreement, and requested that he confirm Frontier's intent to comply with its terms. (JX 5) She also asked him for the following information: a list of all affected employees; a copy of the electronic Section 1 form referenced in the July 19 e-mail; and the identity of those individuals who would be contacting the employees in lieu of HR and asking them to provide their sensitive personally identifying information. (Tr. 43–45; JX 5) Homes responded the following day, asserting that all employees hired during the operative period would be required to reverify. (JX 8) This was a departure from the 2013 agreement, in which only those employees who did not have a completed I-9 were required to reverify, and it covered nearly the

entire bargaining unit. (Tr. 47; JX 5) Homes indicated that he would get back to the Union about a list of affected employees, but that given the near-universal scope of the reverification plan, "a recent seniority list should get you what you need." (JX 8) He also indicated that he would follow up on the Section 1 document and represented that "certain managers and HR reps" would be acting as authorized agents for verifying documentation. (JX 8) Homes also represented that the Company would not be asking for copies of the verification documents. (JX 8)

B. The Union requested information and bargaining over the reverification process, but Frontier refused both requests.

Mr. Homes' admission that essentially the entire bargaining unit would have to reverify their I-9 documentation was a cause for concern. (Tr. 47) To Ms. Perry, it did not make sense that the Employer needed to reverify all of these employees just a few years after the 2013 reverification process. (Tr. 47–48) Also, as in 2013, the Union was concerned that employees' documents would not be properly safeguarded if copies were made—which was later found to have happened. (Tr. 48) After receiving Mr. Homes' response, Ms. Perry researched the I-9 Advantage system and determined that it was designed to upload and retain copies of the employees' verification documents. This appeared to contradict Mr. Homes' representation that Frontier "will not be asking for copies," adding to Ms. Perry's concern that employee documents were not being properly safeguarded. (Tr. 50; JX 8) And so, on July 29, 2019, Ms. Perry again e-mailed Mr. Homes and sought confirmation that those who had already completed a paper Form I-9 would not be required to do so electronically. (JX 9) Mr. Homes responded that he could not confirm that. (JX 10) Then, on August 1, 2019, Mr. Homes reversed course, stating that employees who did not have a correctly completed Form I-9 were required to reverify. (JX 14) Mr. Homes then referred Ms. Perry to Frontier's outside immigration counsel, Enrique

Gonzalez, for any questions relating to the I-9 requirement. The same day, Ms. Perry sent Mr. Homes an updated request for lists of employees in the categories from which she understood Frontier was requiring reverification:

1. Those the Company has identified as having not completed an I-9.
2. Those the Company has identified as having an incomplete or incorrectly completed I-9.

[JX 15][2]

It is Ms. Perry's undisputed testimony that Frontier did not provide these lists. (Tr. 57:16–24) Nor did it seek clarification as to the information the Union sought or the distinction between these two requests. (Tr. 151–52)

Shortly thereafter, Ms. Perry received an e-mail from Frontier's outside immigration counsel, Enrique Gonzalez. (JX 16) Mr. Gonzalez represented that Frontier had "completed a review of its records and determined that it does not have a correctly completed Form I-9 on file for certain employees." He further represented that "[t]he only Frontier employees that are being asked to go through this [reverification] process are those employees hired after November 6, 1986 . . . and before March 31, 2018 . . for whom the Company does not have a correctly completed Form I-9." (JX 16) But Mr. Gonzalez refused to provide the lists Ms. Perry had requested earlier that day or the deficiency on each I-9 "as the union has no right to this information."[3] He then demanded that the Union provide legal authority to support its entitlement to the information sought.

The Union had no obligation to accede to Mr. Gonzalez's demand for additional explanations or legal authority supporting its request for presumptively relevant information.

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[2] *See* Complaint, ¶ 6(a).
[3] *See* Complaint, ¶ 6(b), 6(d).

Nonetheless, Ms. Perry followed up a few days later by e-mail to her counterpart at Frontier, Peter Homes:

> "As the exclusive bargaining agent, the CWA has the right to receive information concerning our bargaining unit members' status, particularly where the Company is seeking information from them that may impact their continued employment."
>
> [JX 17]

Ms. Perry also provided legal authority to support the Union's entitlement to the information it requested, citing *The Ruprecht Company*, 366 NLRB No. 179 (2018).

Ms. Perry received a response from the immigration attorney, Mr. Gonzalez, on August 8, 2019. (JX 18) He asserted that Frontier was "not required or permitted to bargain over" its compliance with immigration laws. He also threatened the "continued employment of the employees" in the reverification group if they refused to comply. Despite this direct threat to the continued employment of bargaining-unit employees, Mr. Gonzalez questioned the relevance of the Union's request for a list of affected employees and disputed the Union's right to this information.

Notwithstanding this position, Mr. Gonzalez enclosed with his e-mail a list of the bargaining-unit employees Frontier deemed to be noncompliant, although without indicating whether the employee's Form I-9 was missing, incorrect, or incomplete. (JX 18) This list was sixteen pages long and, according to Ms. Perry, covers approximately 95 percent of the bargaining unit. (Tr. 73:18–23) It was also incomplete, covering only the Frontier's West Virginia employees. Mr. Homes later provided names of additional affected employees based out of the Ashburn, Virginia office. (Tr. 74:5–15; 84:17–24) This discrepancy led Ms. Perry to believe that either the Company's data or its presentation of that data was flawed, which could lead to employees being forced to reverify their documentation unnecessarily. (Tr. 153)

After receiving Mr. Gonzalez's August 8 e-mail, Ms. Perry again contacted her Frontier management counterpart, Peter Homes. (JX 19) She clarified that the Union had no objection to the Company complying with I-9 requirements, but that it seemed highly unlikely that all employees hired between November of 1986 and March of 2018 had deficient I-9 forms, as Mr. Gonzalez had represented. She therefore requested that Frontier "identify the specific deficiency for each incorrectly completed I-9." She also requested the "current location and storage method of . . . our members previously completed I-9's and any accompanying documents." (Tr. 75–76) Ms. Perry made these requests because she was concerned that the Employer's broad reverification program indicated that employees' sensitive documents had not been properly safeguarded and may have been compromised.

It is undisputed that Frontier did not provide the information Ms. Perry requested on August 8, 2019. On August 15, Ms. Perry followed up on her August 8 request but did not receive a response. (JX 20; Tr. 76–77) Then, on September 26, 2019, Ms. Perry received a notification from Mr. Homes that approximately 22 percent of the affected employees had not yet completed the first step in reverification under the I-9 Advantage process. (JX 21) Mr. Homes warned that "[o]n or after October 4, 2019, the Company will begin to remove non-compliant employees from the work schedule," and "may treat their employment as voluntarily terminated." (JX 21 at 45) Mr. Homes characterized these removals as "nondisciplinary," but from the Union's perspective "[r]emoving people from their schedules and not paying them is disciplinary." (Tr. 83:1–2)

Ms. Perry responded to Mr. Homes on October 2, 2019. (JX 22) She reiterated that the Employer failed to bargain with the Union before implementing the reverification process and refused to provide the information the Union requested regarding the scope of the deficiencies in

the I-9 forms it already had on file. She also noted that, contrary to Mr. Homes' assurances, some employees were being required to provide scanned or photographed copies of their verification documents.[4] (JX 22 at 3)

The dispute over Frontier's reverification process continued through December of 2019. On December 9, 2019, Ms. Perry received a copy of an e-mail from Frontier suggesting that it was still attempting to obtain reverification from some employees. (JX 24) She contacted Frontier and requested an explanation, and then reiterated the Union's request for "bargaining regarding the Company's requirement to complete an I-9 above and beyond what is required by Federal law." (JX 26) She also repeated her requests for "documentation showing the deficiencies that exist in previously completed I-9s, along with the location and storage method of previously completed I-9s and accompanying confidential documentation." Peter Homes responded that Frontier was not required to bargain over the issues Ms. Perry raised. (JX 27)

During the hearing in this matter, Frontier repeatedly admitted that it refused to provide the information identified in the Complaint and that it failed to notify and bargain with the Union over the reverification process. (Tr. 79; 86:19–22; 157:19–23; 167:24–168:4; 191:8–10)

III. ARGUMENT

A. District 2-13 was entitled to notice and an opportunity to bargain over the effects of Frontier's adoption of the I-9 Advantage system, including the scope, timing, and circumstances of employee reverification.

Frontier's admitted refusal to bargain over its 2019 reverification process was an unfair labor practice because that process was a bargainable effect of its I-9 Advantage implementation. Much of Frontier's evidence at the hearing was directed towards establishing that compliance

[4] The Employer's copying of verification documents was confirmed by Senior Vice President of Labor Relations Bob Costagliola. Mr. Costagliola provided his passport to an HR representative, who took his passport, scanned it, and returned it to him. (Tr. 182, 221)

with federal immigration laws is not a bargainable decision. This is not in dispute—like any other employer, Frontier is required to complete and maintain a Form I-9 for every employee. But the requirement to comply with federal immigration law does not excuse Frontier's refusal to bargain over the scope and circumstances of the reverification process; indeed, Frontier's Senior Vice President for Labor Relations, Bob Costagliola, acknowledged that subjects governed by federal law, such as pay rates, may also be mandatory subjects of bargaining. (Tr. 222–23) Nor is it argued here that Frontier was required to bargain over the decision to adopt the I-9 Advantage system.[5] But once that decision was made, Frontier was obligated to afford the Union notice and an opportunity to bargain over the effects of that decision before it was implemented. *See, e.g., Good Samaritan Hospital*, 335 NLRB 901, 902 (2001); *accord Tramont Mfg.*, 369 NLRB No. 136, slip op. at 5 n.7 (Jul. 27, 2020) (*Tramont III*) (citations omitted). This included bargaining over the time allowed to present work documents and other elements of the reverification process not dictated by federal immigration law. *See Washington Beef, Inc.*, 328 NLRB 612, 620 (1999).

1. The scope and circumstances of reverification are bargainable issues distinct from Frontier's decision to adopt the I-9 Advantage system.

Frontier will likely argue that requiring employees to reverify their immigration status was part-and-parcel of its decision to implement the I-9 Advantage system, and that the Union therefore did not have the right to bargain over the reverification process or any of the details of its implementation. This argument effaces the important and longstanding distinction between

[5] The unfair labor practice charge in this case alleges in relevant part that Frontier failed to bargain in good faith by "failing to provide notice and an opportunity to bargain over the effects of its implementation of Form I-9 software." GCX 1(a). At the hearing in this matter, the Administrative Law Judge sustained Frontier's objection to the litigation of any bargaining obligation it may have had with respect to the decision to adopt the I-9 Advantage system as being beyond the scope of the allegations set forth in the charge document and the Complaint. (Tr. 68)

decisional bargaining and effects bargaining, which is exemplified by the Board's oft-cited decision in *Litton Financial Printing*, 286 NLRB 817 (1987).

In *Litton*, the company decided to discontinue its cold-type printing process and to convert its plant to an entirely hot-type operation. *Id.* at 817. It embarked upon implementation of this decision, transferring its cold-type work to other plants and purchasing additional hot-type equipment. It then laid off approximately one-fourth of its workforce, including several employees who worked exclusively on the discontinued process, without prior notice to the union. The union requested to discuss the lay-off and its impact on them, and subsequently repeated its request for bargaining over both the decision to lay off employees and its effects. *Id.* at 817–18. The company agreed to bargain over the effects of the layoff but refused to bargain over the layoff decision itself. *Id.* at 818.

The General Counsel argued that the layoff was an effect of the decision to convert the production line, and that the union was therefore entitled to bargain over both the effects of the layoff and the layoff itself. 286 NLRB at 819–20. The administrative law judge refused to find an obligation to bargain over the layoff in part because, he believed, any such bargaining "would undoubtedly . . . call into question the rationale underlying the plant conversion itself." The Board disagreed, finding the layoff was a bargainable effect of the conversion decision. *Id.* at 820. In so finding, the Board observed that layoffs were not the "inevitable" or "natural consequence of the decision to convert the plant's operations" and rejected the judge's forecast that any negotiations would be "fruitless." *Id.* at 820.

Litton requires that the Board draw a careful distinction between a non-bargainable technology change, on the one hand, and the bargainable effects of that change on employees' terms on conditions, on the other. Although the General Counsel does not challenge Frontier's

right to adopt the I-9 Advantage system, Frontier has offered no evidence about the system or Frontier's regulatory obligations showing that the reverification process at issue here was a natural or inevitable consequence of its adoption.[6] Just as the union in *Litton* was entitled to bargain over the effects of a technology change, including the possibility to avoid layoffs in part or in full, here the Union should have been afforded an opportunity to bargain over the effects of the I-9 Advantage implementation. This would have permitted the Union to explore avenues for meeting Frontier's compliance goals that did not shift the compliance burden onto the bargaining unit through a wholesale reverification process and the associated threats of discharge. Effects bargaining would also have allowed the Union to negotiate adequate safeguards to protect unit employees' sensitive information contained in their verification documents—both the documents being presented during the current reverification and the copies retained in 2013.

2. Frontier's dire prediction that bargaining will lead to burdensome individualized disputes is unsubstantiated conjecture.

Frontier will likely argue that effects bargaining would have imposed an undue burden on its I-9 Advantage implementation because it could have resulted in the Company having to litigate each employee's compliance status in "up to 1300 individual disputes." (Tr. 118–119; 133) This argument assumes Frontier's as-yet unproven claim that massive reverification was required, and it presupposes the *result* of effects bargaining over reverification would have been such a review process. Neither the Board nor the Union have the power to compel this outcome—the duty to bargain gets the parties to the table but does not prescribe any particular result. *See Barry-Wehmiller Co.*, 271 NLRB 471, 472 (1984) ("[T]he Board does not, either

[6] At the hearing in this matter, Frontier suggested that an audit had disclosed "massive noncompliance," but Ms. Perry credibly testified that she was not informed of the existence of such an audit or provided with any report documenting its results. (Tr. 108, 152) Nor has Frontier explained why it was unable to upload existing documents into the I-9 Advantage system.

directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements, absent unusual circumstances."). Or, as Frontier's counsel succinctly put it, "there's no formula for bargaining." (Tr. 86:15–16)

Here, the effects bargaining process could have yielded many results that did not require the individualized determinations Frontier presupposes. For example, as Ms. Perry testified, during effects bargaining the Union and the Employer could have grouped employees by the type of deficiencies and resolved those issues by group. (Tr. 150–51) But because the Employer did not meet its obligation to bargain over the effects of its adoption of the I-9 Advantage system, one cannot say now what that process would have produced. Thus, Frontier cannot credibly rely on a hypothetical outcome to show that effects bargaining would have presented an undue burden.

Moreover, Frontier's alarmist predictions are not borne out by the history of the parties in bargaining over the Form I-9 reverification in 2013. There, Frontier and the Union resolved the matter in a single bargaining session. Frontier agreed to safeguards that would protect employee privacy and allow adequate opportunity for unit employees to obtain and present documents. In exchange, the Union agreed to encourage members to participate in the reverification process. (Tr. 185–87; JX 5 at 2) Thus, Frontier and the Union already had a roadmap for what Senior Vice President Bob Costagliola considered a "reasonable approach" to effects bargaining, one that eased the burden on employees while also facilitating the compliance Frontier sought. (Tr. 231:18–25) Frontier's suggestion that a radically different and more burdensome result would obtain this time is not evidence—it is unsubstantiated speculation that cannot justify its failure to provide notice and an opportunity to bargain over the reverification process.

3. The Union's request to bargain reasonably encompassed effects bargaining, and any deficiency therein is excused because the I-9 Advantage implementation was presented as a *fait accompli*.

The Union joins with Counsel for the General Counsel's argument that the Form I-9 reverification was presented as a *fait accompli*, which excused the Union from any requirement to demand bargaining. (GC Brief at 11) Additionally, the Union submits that Ms. Perry's request to bargain over "the Company's requirement to complete an I-9 above and beyond what is required by Federal law," (JX 19) is reasonably read as a request to effects bargain. Ms. Perry's request to bargain was part of an e-mail whose subject was the ongoing reverification process, not Frontier's prior adoption of I-9 Advantage. Because the reverification is an effect subject to bargaining (see Section III.A.1, *supra*), the request to bargain over it was in fact a request for effects bargaining. *Cf. Litton*, 286 NLRB at 818–20 (finding effects-bargaining obligation where layoff decision determined to be a bargainable effect of a non-bargainable plant conversion). Thus, even if Frontier had provided notice (which it did not) the Union timely requested effects bargaining by Ms. Perry's e-mail of August 8, 2019.

4. The impact of reverification was not de minimis.

Frontier will likely argue that the impact on employees of the Form I-9 reverification was de minimis. For example, Peter Homes described the completion of the form itself as "fairly quick and painless." (JX 12) This misses the point: reverification involved more than just filling out a form, and the potential consequences for noncompliance were severe. From the outset, Frontier required employees to complete the electronic Form I-9 *and* to present work-status documents within a limited time period. (JX 3) *Cf. Washington Beef, Inc.*, 328 NLRB at 620 (designating time afforded to provide verification documents a mandatory subject of bargaining). For employees who did not have the required documents readily available, the requirement to reverify imposed a substantial burden. Indeed, Frontier tacitly acknowledged this

burden when it mandated a wholesale reverification of the bargaining unit instead of reviewing employees' previously submitted documents (which, by then, were centrally located at its HR offices), thereby shifting much of the compliance burden onto its employees.[7] And noncompliance could lead to termination of employment—unquestionably a substantial consequence for the affected employees. Thus, the effects of Frontier's implementation of the I-9 Advantage system were far more than de minimis.

5. Frontier has not shown exigent circumstances that might excuse its failure to afford the Union notice and an opportunity to bargain.

Frontier has not presented any evidence that it faced exigent circumstances requiring the immediate implementation of its reverification plan. *Cf. Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (finding an exception to the duty to bargain where "economic exigencies compel[led] prompt action."). To the contrary, after it initiated the reverification, Frontier "kept kicking that can down the road." (Tr. 142–43) Frontier Senior Vice President Bob Costagliola also testified that any compliance issues underlying Frontier's reverification process had existed for "a number of years" without being addressed, belying any emergency. (Tr. 192:19) And Frontier did not immediately begin removing employees for noncompliance, but instead issued several reminders and warnings over the ensuing months. This shows that implementation of the reverification was not an exigent requirement that the Company could implement without affording the Union notice and an opportunity to bargain.

[7] Bob Costagliola testified repeatedly that he was initially told that the reverification process was required "because we got this new software program and everyone had to submit data again," and that "everybody was going to provide fresh data for this new Advantage I-9 database." (Tr. 193:24–25; 222–23) While he later attempted to walk this back, this initial, unguarded testimony offers the most plausible explanation for the near-universal reverification: Frontier simply did not want to comb through its records to confirm employees' Form I-9 status, so it mandated that they resubmit them.

B. The information Frontier undisputedly failed to provide was material and relevant to the Union's representational duties.

As a corollary to Frontier's obligation to bargain with the Union over the effects of its implementation of the I-9 Advantage system, it was required to respond in good faith to the Union's requests for material and relevant information. Frontier concedes that it did not provide the information the Union requested relating to the reverification process but argues that this information was not relevant to any bargainable subjects. To the contrary, the record clearly establishes that the Union's requests were relevant and that Frontier has not shown any circumstances that would justify its failure to provide the requested information.

An employer has a statutory obligation to provide requested information that is potentially relevant to a union's fulfillment of its responsibilities as the employees' exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty to bargain "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." 385 U.S. at 486. The standard for relevancy is a ''liberal discovery-type standard,'' and the sought-after evidence need not be dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. *Aerospace Corp.*, 314 NLRB 100, 103 (1994). Information concerning unit employees' terms and conditions of employment is ordinarily presumptively relevant and must be provided on request. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90–91 (1995). And irrespective of its decisional bargaining rights in a given sphere, a union remains entitled to information relevant to its right to bargain over the effects of such a decision. *Comar, Inc.*, 339 NLRB 903, 912 (2003) (citing *Sea-Jet Trucking Corp.*, 327 NLRB 540 (1999)).

This case involves four information requests contained in two discrete pieces of correspondence, all of which relate to the Union's attempt to confirm and clarify the scope of Frontier's Form I-9 reverification process. Frontier's reverification was originally advertised as affecting only "[c]ertain Frontier employees" hired between Nov. 6, 1986, and March 31, 2018, but was later described variably as affecting all employees in that group or an indeterminate subset who had deficient forms. (JX 3, JX 8 at 2, JX 10, JX 16, JX 18) After she was unable to get a straight answer about the scope of the reverification process, District 2-13 Administrative Director Letha Perry requested two lists of bargaining-unit employees: (1) those identified as having not completed an I-9; and (2) those identified as having an incomplete or incorrectly completed I-9. (JX 15) Then, on August 8, 2019, Ms. Perry requested two additional items of information: (3) the specific deficiency for each incorrectly completed I-9; and (4) the "current location and storage method of . . . our members previously completed I-9's and any accompanying documents." (JX 19) Frontier admits that it did not provide any of this information. (Tr. 157:19–23; 167:24–168:4)

The partial list Frontier provided on August 8, 2019, did not satisfy its obligation to respond to the Union's pending requests. Frontier's August 8 response must be viewed in the context of its initial, unequivocal refusal to provide the requested information, which came minutes after Ms. Perry's initial August 1 request, and which it never disavowed. (JX 16) And while Frontier's immigration counsel later provided a partial list of employees for whom he claimed "Frontier does not have correctly completed I-9s," this was not responsive to either of the Union's first two requests, which were then pending.

At the hearing, Frontier's counsel asked Ms. Perry whether it would be reasonable to interpret requests 1 and 2 as seeking the same information (Tr. 134:19–25), but this is irrelevant.

Frontier never attempted to clarify Ms. Perry's requests or indicated that it considered the list it provided on August 8 to be responsive to either request. *See Azabu USA (Kona) Co.*, 298 NLRB 702, 702 n.3 (1990) (observing that employer bears the burden to request clarification when it considers a request to be ambiguous). Moreover, Frontier's outside counsel, Enrique Gonzalez, disclaimed any intent to comply with the Union's request for information, and offered the partial employee list merely "as a courtesy." (JX 18) Thus, Frontier unequivocally refused to provide the requested information as alleged in Paragraphs 6 of the Complaint.

1. The Union sought information that was material and relevant to its representation of employees with respect to the I-9 Advantage implementation.

The Union's first and second enumerated requests sought bargaining-unit information that was therefore presumptively relevant to the Union's representational function. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90–91 (1995). Moreover, the Union needed this information to clarify the scope of the reverification process so that it could determine the appropriate response, including what if any grievance-filing or bargaining might be appropriate. Thus, Frontier's admitted failure to provide the information sought in the Union's first and second requests enumerated above was a violation of its bargaining obligation under Section 8(a)(5) of the Act.[8]

Turning to enumerated requests 3 and 4, Ms. Perry's requests for the specific deficiencies and current location and storage method for each purportedly deficient Form I-9 were also clearly relevant to the Union's representational functions. The list Frontier provided on August 8 contained what appeared to Ms. Perry to be the names of roughly 95 percent of the bargaining

[8] In the alternative, the Union joins with the General Counsel's argument that Frontier unduly delayed in supplying the partial list of employees it intended to reverify.

unit. This raised serious concerns for Ms. Perry, who found it "highly unlikely that 95% of the required I-9's were completed incorrectly." (JX 19)

The Union was not required to take the Employer's representation as to the scope of the deficiencies at face value—its right to bargain includes the right to independently verify Frontier's claims by seeking the underlying data supporting those representations. *See Metro Foods*, 289 NLRB 1107, 1118 (1988). Frontier was unquestionably aware of this basis for the Union's request, because Ms. Perry shared it with Peter Homes at the time the requests were made. (JX 19) The scope of deficiencies in employee documentation was also relevant to the Union's pursuit of individual grievances relating to the reverification process, several of which remain pending. (Tr. 144:9–13) Also, if the Union accepted at face value Frontier's representation that nearly all of the employees' I-9 forms (including those reverified in 2013) and the associated verification documents were either missing or otherwise deficient, this reasonably suggested that it had misplaced or otherwise lost control of employees' sensitive personal information. (Tr. 47–48) Ms. Perry knew that some employees had been required to provide copies of these documents as part of the 2013 reverification. And Frontier's broadly distributed operation, in which many employees were supervised remotely, made it reasonable to assume that some employees would be directed to e-mail or otherwise electronically submit copies of their verification documents.

This risk to employee personal data was a significant issue that the Union could have addressed in effects bargaining over Frontier's reverification process. The Union's concern about data safety—which has never been resolved because of Frontier's refusal to bargain—independently justified the Union's fourth enumerated request seeking the location and storage

method for each purportedly deficient record. Thus, the information Frontier refused to provide was material and relevant to its representation of the bargaining unit.

2. Frontier has not timely raised impossibility or undue burden defenses, which in any event are not supported by the record.

To the extent that Frontier now attempts to argue that it could not produce information responsive to enumerated requests 3 and 4—the report on the deficiencies, storage method, and location for the bargaining-unit employees' Form I-9s—this defense should be rejected as untimely and not supported by the evidence. A party seeking to avoid providing information on the basis of undue burden must assert that claim within a reasonable period after the request is received. *J.I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958). And though it cannot be held liable under the Act for failing to produce information it does not have, an employer has an obligation to make reasonable efforts to secure any unavailable information and, if unavailable, explain or document the reasons for the asserted unavailability. *Rochester Acoustical Corp.*, 298 NLRB 558, 563 (1990). At the hearing in this matter, Frontier's counsel inquired of Union Administrative Director Letha Perry whether, to her knowledge, the Company had the ability to produce deficiencies on an employee-by-employee basis. (Tr. 139) This was the first time anyone from Frontier had suggested that the information the Union sought might be unavailable or unduly burdensome to produce. (Tr. 240:14–22) Ms. Perry did not know the answer (nor would she be in a position to know this) but no one from Frontier ever told her that it was unable to provide the information sought. (Tr. 152) To the contrary, Frontier representative Peter Homes admitted that the Company did have the capability to provide employee-by-employee deficiency data in his October 21 letter to the Union:

> If there is a request to review a specific personnel file in connection with an I-9 grievance, we will provide for such review consistent with Article 6A of the CBA. If there is a request to review a specific Form I-9 in connection with a Form I-9 grievance, **we will provide a copy of the Form I-9 on file, if any**. **We will also provide an explanation of the deficiency with the current Form I-9, if any**.
>
> [JX 23, emphasis added]

Because Frontier failed to timely raise impossibility or undue burden, it cannot now assert these defenses, which are in any event contradicted by the representations of its own manager, Peter Homes. The Administrative Law Judge should therefore reject such defenses to the extent that Frontier raises them.

C. The appropriate remedy for Respondent's unfair labor practices includes providing the requested information.

The appropriate remedy for Frontier's admitted failure to bargain over the effects of its adoption of the I-9 Advantage system includes bargaining upon request with the Union. *See, e.g.*, *Litton Business Systems*, 286 NLRB at 822 (ordering effects bargaining upon request). Before meaningful effects bargaining can occur, however, the Union must receive the material and relevant information upon which such bargaining will be based. *See Miami Rivet of Puerto Rico*, 318 NLRB 769, 771–72, 773 (1995) (finding that the refusal to provide relevant information "precluded meaningful effects bargaining" and ordering the company to both provide the information and effects bargain upon request).

The Board's framework for determining whether a requesting union is entitled to information sought as a remedy for a un unfair labor practice was recently clarified in *Boeing Co.*, 364 NLRB No. 24 (Jun. 9, 2016). There, the Board observed:

> The employer bears the burden to prove that the union has no need for the requested information. *Borgess Medical Center*, [342 NLRB 1105, 1107 (2004).] Where the employer has demonstrated that the original, stated need for the information is no longer present, the General Counsel or the union . . . must articulate a present need for the information. *See Finley Hospital*, 362 NLRB No.

> 102, slip op. at 10 (2015) (ordering production of information only "if the Union articulates a present need for this information").
>
> * * *
>
> If a respondent, based on evidence available before or during the merits hearing before the administrative law judge, wishes to argue that production should not be ordered because the union has no need for the information, the respondent must introduce the relevant evidence during the merits hearing and argue the issue to the judge. The judge should permit the General Counsel and the charging party to contest the respondent's claim or to state an ongoing need for the requested information and to introduce evidence accordingly. . . . If evidence that the union has no need for the information first becomes available after the merits hearing has closed, the respondent may raise the issue in the compliance stage of the case. . . . The burden of proof to establish that the information is no longer needed remains with the respondent.
>
> [*Boeing*, slip op. at 4–5]

Frontier did not challenge the Union's present need for the information, either as an affirmative defense in its answer or in its opening statement at the hearing. (GCX 1(e) at 3–4; Tr. 26–28) Nor has it provided any evidence that would demonstrate that the information is no longer needed. The Union therefore urges the Administrative Law Judge to disregard any argument Frontier may offer on this point as not appropriately raised.

Notwithstanding Frontier's failure to appropriately raise this issue, the information sought by the Union remains necessary to ensure the efficacy of any effects bargaining ordered as a remedy here. Although it appears that most of the affected employees have complied with the reverification process initiated in 2019, Frontier's history of repeatedly reverifying employees' immigration status would reasonably lead the Union to bargain prospective standards for employee reverification. For example, understanding the actual Form I-9 deficiencies that led to Frontier's near-universal reverification process (which have never been satisfactorily explained) would be relevant to the Union's formulation of proposals for reasonable restrictions on the circumstances that could trigger future reverification processes. The Union might also

seek to bargain for a less-burdensome alternative method for resolving Form I-9 discrepancies depending on the type of deficiency and whether Frontier retained valid working papers for those individuals. Similarly, if the information obtained showed that Frontier's representations regarding widespread deficiencies were inaccurate, the Union might formulate proposals aimed at third-party verification of future deficiencies (for example, by an arbitrator) under certain circumstances.

Moreover, Frontier's representation that it did not have correctly completed Form I-9s for roughly 95 percent of the bargaining unit (JX 15)—even though it completed a reverification in 2013 that involved in many instances retaining copies of employees' verification documents—gave rise to a reasonable concern that employees' sensitive documents had not been properly safeguarded and may have been compromised. Frontier has never addressed this issue with the Union, nor did it offer any evidence at the hearing as to the location and method of storing the Form I-9 documents collected prior to the transition to I-9 Advantage. The security of bargaining-unit members' sensitive personal information is therefore an ongoing concern to which the information sought by the Union remains relevant.

This is by no means an exhaustive description of the potential uses for the information sought as a remedy in this case, but it underscores the Union's continuing interest in the information requested. Thus, while the Union maintains that Frontier neither timely raised this issue nor met its burden of proof, it nonetheless submits that its ongoing need for the information it requested necessitates an order to provide that information as part of an appropriate remedy in this case.

IV. CONCLUSION

Wherefore, Communications Workers of America, District 2-13 urges the Administrative Law Judge to find and conclude that Frontier Communications committed the unfair labor practices alleged in the Complaint. The Union further requests that the Judge order an appropriate remedy, including requiring Frontier to bargain upon request over the effects of the I-9 Advantage implementation, and to provide the Union with the information it requested, including: the lists of employees who, as of August 1, 2019, were either missing Form I-9s or had a deficient Form I-9; a specification of the deficiencies identified; and the storage location and method of storage for previously completed I-9 forms submitted by bargaining-unit employees.

Dated: September 29, 2020

Respectfully submitted,

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/s/ Joseph D. Richardson

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I served counsel for Respondent and counsel for the General Counsel with the Union's Post-Hearing Brief by e-mail per 29 C.F.R. § 102.5(f).

Dated: September 29, 2020 /s/ Joseph D. Richardson

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